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IN THE

SUPREME COURT OF THE UNITED STATES

1957 TERM

No._____

ABRAHAM THOMAS,
APPELLANT,

vs.

COLONEL JAMES W. DAVIS, COMMANDANT,
UNITED STATES DISCIPLINARY BARRACKS,
FORT LEAVENWORTH, KANSAS,
APPELLEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Appellant, Abraham Thomas, respectfully prays for a Writ of Certiorari and review of the judgment of the Court of Appeals, Tenth Circuit, affirming the judgment of the United States District Court for the District of Kansas, denying appellant's Writ of Habeas Corpus. Said case having been decided 29th day of October, 1957. Rehearing denied *November 14th*, 1957.

OPINIONS.

The Petition for Writ of Habeas Corpus was filed in the United States District Court for Kansas, March 21, 1957. Motion to Dismiss was sustained April 29, 1957. No written opinion. The judgment of the Court of Appeals affirming the judgment of the District Court was handed down October 29, 1957. Rehearing denied *November 14th*, 1957. Case No. 5653, September term, 1957, in Court of Appeals, not yet reported in reporter system.

JURISDICTION.

Judgment of the Court of Appeals affirming the judgment of the District Court was entered October 29, 1957. Jurisdiction of the Supreme Court is invoked under Sections 237 (b) and 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, (28 USCA 1257, 2103, 2106, and 1254). Rule 38 of the Supreme Court.

SUMMARY OF MATTER INVOLVED.

Appellant is an illiterate Negro soldier, intelligence quotient 58, who has been found guilty by military court-martial of four charges of premeditated murder and sentenced to death. He is confined in the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pending execution of the sentence.

The sentence has been upheld by army reviewing authorities, affirmed by the United States Court of Military Appeals and confirmed by the President.

QUESTIONS PRESENTED.

1. Can a confession be secured from an illiterate Southern Negro soldier after three days and part of two nights questioning, without charges having been filed, used against him at his courtmartial trial?

2. This Court has said that: (Burns v. Wilson, 346 U. S. 137, footnote 12)

> "The rule of McNabb v. United States, 318 U. S. 332 (1943) . . . is a rule of evidence in the federal civil courts; its source is not 'due process' . . . We have of course no such supervisory power over the admissibility of evidence in courts-martial."

Under the facts in this case isn't the correct rule that laid down in Mallory v. U. S. 77 S. Ct. 1356:

> "The arrested person may be booked, by the police. But he is not to be taken to Police Headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

Isn't the Constitution itself before the Court—not the Appellant?

3. Can a statement be taken from an accused on a tape recorder, without his knowledge—then be played to the triers of fact—and prosecutors argue to the Court that they heard accused in his own words admit his guilt?

4. Do not all the facts in this case, coerced confession —no charges filed until three days and part of two nights questioning had taken place—use of tape recorder and comment of prosecution that Court had heard accused in

his own words admit guilt, deny him a fundamentally fair hearing at his courts-martial trial?

REASONS FOR GRANTING WRIT.

Appellant is an illiterate Southern Negro soldier—he was merely being held in army awaiting a discharge because his I. Q. was only 58. He was questioned for most of three days and part of two nights—without food or blankets—denied right to see a doctor—was subjected to having his statement recorded on a tape recorder—without his knowing it—then at his trial the tape was played to the Court—the prosecutor in his final argument stated that the Court had heard accused in his own words admit his guilt—that accused has been denied a fundamentally fair trial by the courts-martial. Burns v. Wilson, 346 U. S. 137.

ARGUMENT AND AUTHORITIES.

STATEMENT OF THE FACTS.

On April 15, 1954, appellant was sentenced to be put to death upon his conviction for violation of the Uniform Code of Military Justice, Article 118, in Four Specifications of the offense of premeditated murder on four different persons. The sentence imposed was affirmed by the Board of Review which in turn was affirmed by the United States Court of Military Appeals. Case No. 5792 decided June 24, 1955. The sentence was approved by the President of the United States and ordered into execution the instant Petition for Habeas Corpus was filed March 21, 1957. Honorable Arthur J. Mellott, Chief Judge,

United States District of Kansas, April 29, 1957, sustained a Motion to Dismiss and remanded appellant to the custody of the appellee. Proceedings on the appeal were commenced May 2, 1957.

About 11:00 A.M. February 23, 1954, Sergeant Theodore Bryant found four dead bodies in a house in the town of Gersthofen. The appellant was an enlisted man in the United States Army at this place in Germany. It appears that appellant had been keeping company with Elizabeth Wenderott, one of the persons found dead in said house, a week, or ten days, prior to the finding of the bodies. There was evidence that appellant had had an argument with said Elizabeth Wenderott, who apparently struck her and she had filed a Complaint with the military authorities. Appellant was taken into custody on the same day, the 23rd of February, 1954, by the Military Police. He denies that he was advised as to why he was taken into custody. On the very same day he was taken to a Field Hospital and paraffin molds were taken of his hands. He was not advised of his rights to have counsel at any time during the investigation which lasted for four days. (Court Martial Trial R 205)

The Army Investigators interrogated and questioned Thomas from 9 o'clock on the night of Feburary 23, 1954, until approximately midnight. (Court Martial Trial R 207)

Thomas was placed in a Military Police Detention Cell at Ausburg, Germany, that night without blankets or mattress (Court Martial Trial R 210). On the next morn-

ing, February 24, 1954, Thomas was again taken before the investigators and questioned for approximately two hours. (Court Martial Trial R 212)

The same afternoon he was taken in custody of the investigators to the scene of the alleged crime where the investigators pointed out to him pools of blood and gore which were still there. He was shown blood spots on the walls, the ceiling and where the bodies had lain. This trip took approximately one hour. (Court Martial Trial R 212)

Upon return to the Military Jail, he was further questioned for another 30 minutes and later on that same night he was again brought before the investigators and further questioned for another two hours. (Trial Court Martial R 213)

He had still not been advised as to his rights to counsel and according to Thomas never actually informed why he was under arrest. He was asked if he would voluntarily submit to a lie detector test in Munich, Germany.

Thomas again slept that night in the Detention Cell without blankets. On the 25th of February the investigators took Thomas from the Detention Cell at 8 o'clock in the morning and took him to Munich, Germany. He was taken before a Mr. Fox, an Army operator of a lie detector machine. He was given two separate examinations and after periods of questioning by Mr. Fox and actually given a lie detector examination. (Court Martial Trial R 216)

On the same day at about 6 o'clock P.M. Thomas was taken before an Army Officer named O'Brien where he was questioned at length by O'Brien and other investigators. The appellant was ill at the time. (Trial of Court Martial R 220)

Appellant was returned to Ausburg shortly after 9 o'clock that night after having been in the Company and under investigation and questioning by various Army Investigators from 8 o'clock in the morning until after 9:00 P.M. in the evening. The Army Investigators without the knowledge of Thomas made arrangements with an Army Investigator named Beasley to rig up tape recording equipment in their offices in a separate room where Thomas could not see the equipment and to conceal the microphone in another room and to record conversation with Thomas without his being aware of these facts. (Court Martial Trial R 221-222)

The first attempted recording on Thomas' statements to the recorders was a failure. The investigators claim that they then brought the microphone from its concealed place in the room, placed it on the table and had Thomas speak directly into the microphone.

Thomas denied the microphone was ever placed in front of him or in his presence. (Trial Court Martial R 223-224)

In addition to this, the Army Investigators claim they made a Transcript in typewriting of a conversation recorded between Thomas and the investigators. The second Army witness verifies the fact that Thomas was questioned the full two days and later all day at Munich, Germany. (Trial Court Martial R 231) It is also admitted

that the tape recording was never played back or shown to Thomas. (Trial Court Martial R 235)

It is also admitted that Tomas knew nothing about tape recording. (Trial Court Martial R 237)

The Army Investigators further state that they did not believe Thomas could have understood or properly made a written statement (Trial Court Martial R 241)

Thomas had only a 3rd grade education. (Trial Court Martial R 242)

The second Army Investigator admits Thomas was questioned for two hours, February 23rd, 1954, at night. (Trial Court Martial R 251)

He also corroborates the second questioning of Thomas. (Trial Court Martial R 255)

He also corroborates additional questioning. (Trial Court Martial R 258)

He also corroborates still additional conversation, or questioning. (Trial Court Martial R 259)

Additional corroboration a full day and evening questioning and lie detector tests at Munich, Germany. (Trial Court Martial R 260)

This witness also corroborates Thomas' request for a Doctor while at Munich. This request was never granted due to the fact that a funeral was being held for some General. (Trial Court Martial R 261)

Concealment of microphone is corroborated. (Trial Court Martial 266)

Witness corroborates that Thomas had no blankets for two nights and only served eggs by prosecution while undergoing questioning. (Trial Court Martial R 270)

This witness also states Thomas could not have understood a written statement. (Trial Court Marital R 274)

Thomas was never told what a recorder or microphone was, nor advised of his recordings. (Trial Court Martial R 275)

Thomas denied getting to see a Doctor when ill during questioning. (Trial Court Martial R 277-278)

Investigators admit they have been unable to get a statement or admission for first two full days. (Transcript Court Martial 279)

Thomas not told about tape recorder. (Court Martial Trial R 282-283)

Witness corroborates paraffin test. (Court Martial Trial R 291)

Witness testifies Thomas is emotionally unstable. (Court Martial Trial R 312)

Commanding Officer gave Thomas a good record. (Court Martial Trial R 313)

Thomas' IQ only 58. (Court Martial Trial R 314)

Discussion in front of Court Martial at Trial relative to the procedure used in questioning Thomas under lie detector. (Court Martial Trial R 348)

Commissioner Officer O'Brien ordered to question Thomas at Munich. (Court Martial Trial R 353)

Corroboration of long questioning of Thomas. (Court Martial Trial R 360)

Thomas unable to comprehend Questions. (Court Martial Trial R 880)

Typewritten transcript of tape recording Prosecution Exhibit 23 introduced in evidence and read to Court Martial. (Trial Court Martial R 384)

Explanation to Court or operator of tape recorder. (Trial of Court Martial R 390)

Recorder equipment set up in Court. (Court Martial Trial 394)

Actual tape recording Thomas questioning Exhibit 24A introduced in evidence against Thomas. (Trial Court Martial 396)

Tape recording of Thomas' conversation played in open Court Martial Trial to Thomas in Court. (Trial Court Martial R 398)

Thomas after being advised of his rights elected not to testify or take the stand. (Trial Court Martial R 66 and 411)

Argument of prosecution at the close of case commences. (Trial Court Martial R 445)

Prosecutor in argument comments on long questioning of Thomas including fact he was given lie detector test. (Trial Court Martial R 457-460)

PROSECUTION ATTORNEY AND ARGUMENT STATED: "When Thomas was brought back to Augsburg that night after he had confessed in Munich, arrangements were made for a tape recording and this tape recording was placed here in Court and you heard it. And if you will remember the fact that the Transcript of that recording was introduced in evidence first, and if you compared that Transcript with that recording you had very little difficulty in understanding the record-

ing. *You heard in Thomas' own words, as he related how he killed these people; these four people.*" (Trial Court Martial R 460)

The prosecution in its closing argument again directly points out that Thomas, in his own testimony, made certain admissions. At page 462 of the Court Martial Trial record the prosecutor stated: "And according to his own testimony he had blood in his eyes." the record clearly shows that Thomas never had been notified he was entitled to a lawyer, nor had he seen one until after the entire period of questioning which lapsed over four days. (Trial Court Martial R 472)

The prosecution in its argument admits it took full three days to get the accused Thomas to make a statement, or admission. (Trial Court Martial R 479)

The prosecution again in its final and closing argument comments on the fact that Thomas in his own words admits his guilt, Page 480, of the Trial Record and Court Martial. The prosecutor stated as follows: "Nobody has told him what to say. They let him tell it in his own words—as you listen to the tape there—and those words were his own words gentlemen. Words were not put into his mouth."

POINT I.

The record shows that appellant was questioned for three days before he made any admission. He was never advised of his right to counsel at any time during his questioning. On the day he was taken into custody and he denies he was told why he was taken into custody, he thought it was on the Complaint filed by the victim

Wendroth of assaulting her—he was taken to an Army Hospital and given a paraffin test. He had not been advised of his rights under Article 31 up to this time. The record so shows.

He was next questioned for three hours the night he was taken into custody. That night he was placed in a detention cell without mattresses or blankets. The next day he was further questioned at length, and shown the results of the paraffin tests. In the afternoon he was taken to the scene of the crime—shown the blood on the walls, floors and the gore that still remained. He was taken back to the cell and again questioned. He was questioned again that night. He again slept in a cell without blankets.

The next day he was taken to Munich at 8:00 A.M., and went through an entire day and up to 9 o'clock at night of questioning. He was given two lie detector tests—this fact was brought out by the prosecution at his Court Martial Trial—although there was no report on how the lie detector tests came out—one must assume that the triers of fact could only conclude the tests were against the appellant. He was on the same day questioned by Officer O'Brien who had been ordered to do so by his Commanding Officer—appellant was sick and wanted to see a Doctor—he was not allowed to do so—the reason given was that a General's funeral was that day and nobody was available. He was returned to Augsburg about 10 o'clock that night—so after three full days and two nights it is claimed he broke down and made admissions to Officer O'Brien—it is also to be noted that

on this night he was given blankets. It is also noted and not denied in the record that appellant on the first two days of his confinement while undergoing questioning he was only given eggs for his morning meals. On the following day, which is the fourth full day, he was subjected to being tricked into talking to two Army Investigators in a room where a tape recorder had been hidden without appellant's knowledge—the first recording was a failure because the microphone had been concealed under a garrison cap. The investigators claim they then put the microphone on the table in front of appellant and had him repeat his story. Appellant denies he ever knew his voice was being recorded and the record shows he was never so advised.

The case of Mallory v. U.S., 77 S. Ct. 1356, applies directly to point One. It provides that under enforcement of Federal Criminal Law that an accused must be arraigned "without unnecessary delay" citing Rule Five A of the Federal Rules of Criminal Procedure (18 USCA). This applies to all persons accused of Federal Crime—and therefore covers Crimes under The Uniform Code of Military Procedure.

The Court said at Page 1359:

> "The arrested person may be booked, by the police. But he is not to be taken to Police Headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt."

In the Mallory case the Court quotes from the leading case, the case of McNabb v. United States, 318 U.S. 332; 63 S. Ct. 608, 614; 87 L. Ed. 819, as follows:

> "The purpose of this impressively pervasive requirement of criminal procedure is plain. * * * The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society.
>
> "For this procedural requirement checks resort to those reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime."

No doubt the crimes charged in this case were henious. However, the Supreme Court in the case of Chessman v. Teets, 77 S. Ct. 1127 at 1132, stated:

> "On many occasions this Court has found it necessary to say that the requirements of the Due Process Clause of the Fourteenth Amendment must be respected, no matter how heinous the crime in question and no matter how guilty an accused may ultimately be found to be after guiit has been established in accordance with the procedure demanded by the Constitution."

The interest of the United States in a criminal case is not that it should win a case but that Justice shall be done. Berger v. United States, 295 U.S. 78, 88.

Military Courts are bound by the decisions of the United States as to admissability of confessions.

U. S. v. John A. Bennett,
7 U.S.C.M.A. 97,
21 CMR 223.
U. S. v. Taylor,
5 U.S.C.M.A. 178,
17 CMR 178.

The Military Court of Appeals passed on the direct question in this case that the pretrial statements made by the accused were not coerced—they held against him—USCMA—U.S. v. Abraham Thomas, No. 5792, decided June 24, 1955. So this constitutional right of appellant can clearly be reached in this proceeding.

Certainly, the armed forces operating under the Uniform Code of Military Procedure cannot set up a different set of rules, or interpret the Constitution in a manner not approved by the Supreme Court. Can there be any question as to what the Supreme Court would hold where, as here, the accused was confined and continuously questioned for four full days and two nights without being charged or arraigned—and the statements so elicited used against him at his trial. Certainly the law and the Supreme Court's rulings on it are now plain and clear in view of recent decisions.

POINTS II AND III.

On the fourth day of the continuous questioning of appellant he was tricked into making a long statement which was recorded on a tape recorder. The machine had secretly been set up in a room at headquarters, a microphone was placed in a second room and concealed behind a garrison cap—appellant was interrogated in the room where the microphone was concealed. He was not advised that the conversation, or statement, was being recorded. It happened that this first recording was not usable because of the cap placed over the microphone. The investigators claim they then placed the microphone on a table in front of appellant and he agreed to repeat his statement again speaking into the microphone. Appellant denies the microphone was placed before him. In any event he was not told the statement was being recorded, nor was he given any explanation. In fact the investigators state they doubt if appellant even knew what a microphone, or a tape recorder was.

At the Court Martial Trial of appellant a typewritten copy of the tape recording, prepared by the investigators was read to the Court Martial. Also the actual tape recording was played to the Court Martial. In addition when the prosecution made its closing argument the following statements were made to the Court:

> "And if you remember the fact that the Transcript of that recording was introduced in evidence first, and if you compared that Transcript with the recording you had very little difficulty in understanding the recording. *YOU HEARD IN THOMAS' OWN WORDS, AS HE RELATED, HOW HE KILLED*

THESE PEOPLE; THESE FOUR PEOPLE." (Court Martial Trial R. 460)

Again at page 480 Trial Court Martial:

"THEY LET HIM TELL IT IN HIS OWN WORDS—AS YOU LISTENED TO THE TAPE THERE—AND THOSE WERE HIS OWN WORDS, GENTLEMEN."

The appellant under his constitutional right under the Fifth Amendment elected not to take the stand. (Court Martial Trial R 66 and 411)

Do the above facts amount to requiring appellant to testify against himself?

The appellee in the Court below and, no doubt, in this Court relied on the rule laid down in a case decided by its Court, to-wit: Beverly, Suttles & Riggens v. Davis, 215 F.(2d) 763, to the effect that a claimed denial of a constitutional right must be present to the Military Courts and if not, it cannot be first brought up on a Writ of Habeas Corpus—However, the Supreme Court in the case of Chessman v. Teets, 73 S. Ct. 1127-1132, stated:

> "Evidently it also needs to be repeated that the over-riding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. This Court may not disregard the Constitution because an appeal in this case, as in others, has been made on the eve of execution. We must be deaf to all suggestions that a valid appeal to the Constitution, even by a guilty man, comes too late, because Courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

The Supreme Court has in several recent cases clearly indicated the sanctity of the right of any person to not incriminate himself. Watkins v. U. S., 77 S. Ct. 1173.

The right to not incriminate oneself has recently been passed on by our Supreme Court; Ullmann v. United States, 76 S. Ct. 497; 350 U.S. 422. The Court held that the constitutional protection against self-incrimination must not be interpreted in a hostile or niggardly spirit. That the privilege should be interpreted in view of policy that it is better for an occasional crime to go unpunished than that prosecution should be free to build up a criminal case, in whole or in part, with assistance of enforced disclosures; that the privilege should serve as a protection to the innocent as well as to the guilty, and should be given a liberal construction; that the Court approaches claims of constitutional guarantee against self-incrimination in a spirit of strict, not lax, observance of the constitutional protection of the individual.

The cases of Burns v. Wilson, 346 U.S. 137, and Toth v. Quarles, 350 U. S. 11, hold that under the uniform Code of Military Procedure the accused must be afforded a fundamentally fair trial; that the power of Courts Martial should be scrupulously guarded and its power limited rather than enlarged.

CONCLUSION.

We must bear in mind that appellant, born in the South, had only a 3rd grade education; that he had no previous record or familiarity with Courts. That the so-called confessions were coerced after four full days of questioning; that he was never charged during this time; nor advised of his right to counsel; that a tape recording of his own voice was played to the Court and that the prosecutor in the final argument twice commented on the fact that the Court had heard appellant "in his own words" admit his guilt—this in face of appellant's decision not to take the stand.

The interest of the United States in a criminal case is not that it should win a case, but that Justice shall be done. Berger vs. United States, 295 U.S. 78, 88.

Appellant respectfully prays the Honorable Court to grant certiorari herein.

Respectfully submitted,

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Attorney for Appellant.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 372 Misc.

ABRAHAM THOMAS, PETITIONER

v.

COLONEL JAMES W. DAVIS, COMMANDANT, UNITED STATES DISCIPLINARY BARRACKS, FORT LEAVENWORTH, KANSAS

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The opinion (C. A. 3–9) [1] of the Court of Appeals has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1957 (C. A. 12). A petition for rehear-

[1] The transcript made at the District Court hearing is referred to as "R.". The original court-martial record, which was Respondent's Exhibit C below, is referred to as "C. M.". The pleadings filed in the District Court, which are bound separately, are referred to as "P.". The Court of Appeals proceedings, also separately bound, are referred to as "C. A.".

ing was denied on November 14, 1957 (C. A. 14). The petition for a writ of certiorari was filed on November 27, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, on petition for habeas corpus alleging a violation of due process in court-martial proceedings, the court below erred in holding that petitioner was not entitled to further review of factual issues which either had not been raised or had been fully and fairly considered and found groundless in military appellate processes.

2. Whether (even apart from any question as to scope of review) petitioner's confession was properly admitted in evidence.

STATUTE INVOLVED

Article 31, Uniform Code of Military Justice, 10 U. S. C. (Supp. IV) 831, provides:

> (a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.
>
> (b) No person subject to this chapter may interrogate, or request any statement from, an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

STATEMENT

Petitioner, a soldier stationed in Germany, was convicted by general court-martial of the premeditated murder of four persons and was sentenced to death (C. M. 501, 508). After review, the convening authority approved the findings and sentence. On appeal, after full hearings, the findings and sentence were affirmed by the board of review (Res. Ex. D.) and the Court of Military Appeals (6 U. S. C. M. A. 92, 19 CMR 218).[2]

Subsequent to petitioner's transfer to the United States Disciplinary Barracks, Fort Leavenworth, Kansas, pending execution of the sentence, he filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas, attacking *inter alia* the admissibility of his confession (P. 3). The District Court, after hearing, discharged the writ

[2] On February 5, 1957, the President approved the death sentence and directed that it be executed.

without opinion and dismissed the petition (P. 9). The Court of Appeals affirmed.[1]

The evidence presented at the court-martial may be summarized as follows:

1. Petitioner was friendly with Walburga (also known as Elizabeth (C. M. 60, 106)) Wenderoth, who resided in Gersthofen, Germany. They had an altercation on February 5, 1954, which led to the summoning of civilian and military police (C. M. 56–57). Petitioner was searched at that time, a knife was found, and he was taken to the military police station (C. M. 57–58). After having been advised of his rights under Article 31 of the Uniform Code of Military Justice (10 U. S. C. (Supp. IV) 831) to decline to incriminate himself and to refuse to make any statement (C. M. 58), petitioner voluntarily (C. M. 58–59, 64) told one of the military policemen that he was jealous of Elizabeth's "running around with other men" and had had a fight with her (C. M. 67). A delinquency report was filed against petitioner and he was released (C. M. 70).

Petitioner's unit was in the field (on maneuvers) from February 8 to February 20, 1954 (C. M. 81–82). Upon his return he had his carbine but did not turn it in to the arms room at that time (C. M. 82–83). At about 10:00 p. m. on February 22, petitioner went to Corporal Robert Smith, the supply clerk, and asked for the key to his wall locker, al-

[1] The Government was recently informed that petitioner has suffered a subarachnoid hemorrhage and is now partially paralyzed. On December 26, 1957, he was transferred to Fitzsimons Army Hospital, Denver, Colorado.

though petitioner was supposed to have a key of his own (C. M. 92, 98). The locker key was on a ring with, among others, the key to the ammunition room (C. M. 92). Smith detached the locker key and gave it to petitioner (C. M. 92). Petitioner later that evening went to Sergeant Glendown, the supply sergeant, and repeated his request (C. M. 97). Glendown, who in the meantime had gotten the key ring from Smith, gave the whole ring to the petitioner (C. M. 98). At about 7:00 a. m. the following morning, February 23, petitioner turned in his carbine, saying that it was dirty and that he would clean it later (C. M. 83). About two hours later petitioner came back to the arms room and cleaned his weapon (C. M. 84).

On the afternoon of February 22, Sergeant Theodore Bryant dropped off his friend, Corporal Peters, at the home of Elizabeth Wenderoth and Miss Anna Weigel (C. M. 57, 105–106, 108). When Peters failed to return by 10:00 a. m. on the following day, Bryant returned to the house to look for him (C. M. 108–109). Bryant found four dead persons in the house: Peters, Sergeant Lafayette Bennett, Elizabeth Wenderoth, and Anna Weigel (C. M. 105, 109–114, C. M. Pros. Ex. 1, 7–9, 11–13A (admitted at C. M. 132–137, 163)). All had died almost instantaneously as the result of gunshot wounds. In the opinion of the medical examiner, the wounds were inflicted between 9:00 p. m. on February 22 and 1:00 a. m. on February 23 (C. M. 139–148). In particular, Corporal Peters had been shot or pickaxed some twenty times (C. M. 142, 144, 149). There was a hole the size of a man's fist in the back of Elizabeth's head (C. M. 145).

Both military and civilian police were called to the scene (C. M. 165, 201). A search of the premises uncovered a number of expended bullets and used cartridge cases (C. M. 166–168, 202–205, 226–228, C. M. Pros. Ex. 13A). In addition, the investigators, Sergeants Stanton and Boatner, learned of petitioner's earlier relationship with and assault on Elizabeth at that time (C. M. 204, 236, 248). Accordingly, the military police were asked to apprehend petitioner and obtain the carbine assigned to him from his unit (C. M. 204, 249).

Petitioner was apprehended at about 3:00 p. m. on February 23, 1954 (C. M. 249). He was taken to the Army Hospital in Augsburg, Germany, where paraffin molds of his hands and wrists were made (C. M. 205). At about 5:30 p. m., the molds, petitioner's carbine, and the bullets and cartridge cases found at the scene were sent off to the laboratory (C. M. 79–82, 205, 250, 251, C. M. Pros. Ex. 5, 6).

Sergeants Stanton and Boatner next saw petitioner after he had had dinner at about 9:00 p. m. on February 23 (C. M. 206–207). They informed him that he was suspected of the offense of murder (C. M. 207). Boatner read and explained Article 31 of the Code to petitioner (C. M. 251), and Stanton repeated the explanation in the following manner (C. M. 207):

> I explained first he need not answer any questions that might tend to incriminate him or that would in fact incriminate him or degrade him, that concerning the offense of which he was accused or suspected, he need not make any statement at all or answer any questions at all, and

that any statement that he did make could be used against him as evidence and used in a trial by court-martial.

The investigators explained to petitioner that they knew about his past relationship with Elizabeth, about his previously assaulting her, and about his extreme jealousy of her. They told him they expected the paraffin molds to show traces of nitrates, spoke of the inference that could follow such a finding,[4] and informed him they believed tests would show that petitioner's weapon had been used to fire the slugs and casings found at the scene. Petitioner was questioned at length concerning his family background and past life, both civilian and military (C. M. 208). After some questioning regarding petitioner's activities during the weekend beginning February 20, the interrogation was terminated at about 11:30 p. m. and petitioner was placed overnight in a detention cell at the Military Police Station in Augsburg, Germany (C. M. 207, 209–210).[5]

Stanton and Boatner next saw petitioner at about 1:00 p. m. on the following day, February 24. Peti-

[4] Nitrates are among the combustion products of gunpowder. The presence of nitrates on the hands of a person does not necessarily mean that the person has discharged a firearm recently, but only that firearm discharge is a possible source (C. M. 324).

[5] Although Stanton did not know it at the time, the cell had no mattress or blankets but was heated (C. M. 210). As a matter of local policy, none of the detention cells had mattresses or blankets because prisoners in the past had "burned them, torn them up and used them as a means to commit suicide" (C. M. 255). However, petitioner was not given a mattress or blankets through oversight, not design (C. M. 282).

tioner said that he had eaten both breakfast and the noon meal. He was again informed of his rights under Article 31 (C. M. 210, 255). Petitioner was told of the laboratory report* and he was questioned for about two hours (C. M. 211). A trip to the scene was undertaken and petitioner was returned to his cell at about 4:30 p. m. (C. M. 212). That evening, Stanton and Boatner talked to petitioner for about 1½ hours, ending at 9:00 p. m. (C. M. 213). They reminded him of the suspected offenses, read and explained Article 31 once again, and asked petitioner if he would consent to a polygraph examination. Petitioner agreed and was returned to the detention cell (C. M. 213).

The following morning, after breakfast, Stanton, Boatner, petitioner, and a Sergeant Myers drove to Munich, Germany, for the polygraph test (C. M. 214). The rest of the day, February 25, until 4:00 p. m. was taken up with an hour's wait for the polygraph operator, Chief Warrant Officer Fox, an hour and one half break for lunch, and the examination itself (C. M. 214, 217, 347–351). Fox advised petitioner of his rights under Article 31 at the beginning of the examination (C. M. 347–348). He did not threaten petitioner in any way and made no promise to him (C. M. 350–351). Stanton and Boatner then took petitioner to the office of Chief Warrant Officer Joseph C. O'Brien, operations officer for the 13th

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*Ballistics evidence was offered to show that petitioner's carbine had been used to fire the bullets and casings found at the scene (C. M. 299–301).

Military Police Criminal Investigation Detachment (Stanton's unit), and left him there (C. M. 214, 218, 352–353). Petitioner had mentioned that he had a headache and asked to see a doctor, but none was available at the time (C. M. 277–278).[1]

Mr. O'Brien and Sergeant McGreevey again read and explained Article 31 to petitioner, and O'Brien then questioned petitioner about his prior life, leading up to the night of February 22, 1954 (C. M. 353–354). At about 7:00 p. m., petitioner, O'Brien, and several others went over to the local snack bar where they had dinner (C. M. 356). On the way back to the office, petitioner told O'Brien he wanted to tell him something and agreed to tell his story that evening (C. M. 357).

Thereafter, having been reminded of Article 31, petitioner, in the presence of four witnesses, told of his activities on the night of February 22–23 (C. M. 357–358, 370–371). It appears petitioner had gone to Elizabeth's house at about 6:00 p. m. on February 22 and found her there alone with Anna. After he had been there for about thirty minutes, Peters and Bennett appeared. A battle soon started, and Peters and Bennett pushed petitioner out of the house. He reentered to continue the fight, but all four of the occupants joined in ejecting him from the house and yard. After promising to return, petitioner went back to his barracks, obtained the key to the ammunition room through the ruse described *supra*, pp. 4–5, and took a

[1] The dispensary was closed because of a funeral.

supply of ammunition. Petitioner brooded over his mistreatment until sometime after 10:00 p. m., then took his carbine and the ammunition, and walked back to Elizabeth s house. Arriving there after midnight, petitioner found the door open and entered. He came upon Elizabeth and Peters in bed. She said something, and petitioner shot both of them. According to petitioner, as he attempted to leave, first Bennett and then Anna Weigel attempted to disarm and stop him, thereby committing "suicide", for he promptly shot them too. Petitioner returned to his unit in time to stand reveille in the morning (C. M. 370-372).

Stanton and Boatner returned to the office in time to hear petitioner tell O'Brien that "he wasn't mad at anyone", had no hard feelings, and had been well treated (C. M. 219). The investigators took petitioner back to the police station in Augsburg, arriving there about 9:45 p. m. Petitioner asked for a mattress and blankets; these items were obtained from the bunk of the night duty investigator and given to him (C. M. 220).

Petitioner was next questioned after breakfast the following morning. He was advised of his rights under Article 31 and made an oral statement to Stanton and Boatner. Although petitioner did not know it, the investigators had secreted a microphone in the room to record the statement (C. M. 221–222). However, the recording was unsatisfactory. Stanton then placed the microphone on the table in front of petitioner and asked him to repeat the statement. Petitioner consented to do so, with better success the sec-

ond time (C. M. 223; C. M. Pros. Ex. 23, 24, 24A). This statement began with an explanation of petitioner's rights, and was essentially a repetition of the earlier statement to O'Brien (C. M. Pros. Ex. 23).

2. Mr. O'Brien made no promise to petitioner before obtaining his statement and did not threaten him in any way (C. M. 358). Petitioner did not ask to see a doctor while with Mr. O'Brien (C. M. 360). He made no complaints concerning his sleeping accommodations and the food he was receiving (C. M. 364). Petitioner did not strike O'Brien as a person of particularly low mentality (C. M. 362), although petitioner was due for early discharge because of that reason (C. M. 312). He was able to define self-incrimination for O'Brien as meaning that "anything he did say could be used against him [in court] and that he did not have to say anything" and knew the meaning of "degrade" (C. M. 361, 379). O'Brien had told petitioner of the seriousness of the offense and of the likelihood of court-martial (C. M. 363). The pretrial statement made to O'Brien was very elaborate—even dramatic—and coherent. Petitioner did not seem to lack for words or an explanation for his actions (C. M. 379).

Sergeants Stanton and Boatner made no promises to petitioner and did not threaten him (C. M. 242, 267). They felt that petitioner was uneducated, having completed only the third grade, but not stupid (C. M. 230, 231, 242).

3. During the course of court-martial, the tape recording of one of petitioner's pretrial statements was

introduced in evidence (C. M. Pros. Ex. 24A) and played for the benefit of the court-martial members (C. M. 398). In addition, a typewritten transcription of the recording was admitted in evidence (C. M. 385, C. M. Pros. Ex. 23). During closing argument, trial counsel referred to this recording and its transcript, saying (C. M. 460, 480):

> * * * And if you remember the fact that the transcript of that recording was introduced in evidence first, and if you compared that transcript with that recording you had very little difficulty in understanding the recording. You heard in Thomas' own words, as he related, how he killed these people; these four people.
>
> * * * * *
>
> * * * Words weren't put into his mouth; nobody tried to get Thomas to really hang himself and admit that he went down there with the intent to kill all four people or anything like that. It took the chips as they fell—they were recorded word for word, so you have Thomas' own statement as to what happened; nobody wrote it for him. It was written in one person's mind and that was in Thomas' mind. And when he told the truth he related it as it happened as to the best that he could remember it after it happened, as in any event.

4. At the hearing on his petition for a writ of habeas corpus, petitioner testified, although he had not done so at trial (R. 50; C. M. 367, 411). He admitted that he had fought with Elizabeth on February 5, 195- (R. 16), but denied the killings (R. 49–50). He claimed that Stanton and Boatner had not advised him

of his rights under Article 31 until the second day of interrogation (R. 26, 28, 30). He also testified that he had been physically abused and threatened by O'Brien (R. 35–38) and that his pretrial statements had been concocted by O'Brien and Boatner (R. 37, 40). In substance, petitioner testified that he had never voluntarily made a pretrial statement (R. 48).

ARGUMENT

1. Petitioner apparently assumes (Pet. 11–18) that he is entitled to have the civil courts examine *de novo*, on habeas corpus, his claim of denial of due process in the court-martial proceedings, even though the claim is essentially factual in nature and was exhaustively and fairly considered at the several appellate stages of the military system. This Court, however, held in *Burns* v. *Wilson*, 346 U. S. 137, 142, that in these circumstances it is not the function of the civil courts to repeat the reviewing process, reexamining and reweighing each item of evidence tending to prove or disprove one of the allegations in the habeas corpus application. See also *Hiatt* v. *Brown*, 339 U. S. 103; *Dickenson* v. *Davis*, 245 F. 2d 317 (C. A. 10); *Dixon* v. *United States*, 237 F. 2d 509 (C. A. 10); *Day* v. *Davis*, 235 F. 2d 379 (C. A. 10), certiorari denied, 352 U. S. 881; *Suttles* v. *Davis*, 215 F. 2d 760 (C. A. 10), certiorari denied, 348 U. S. 903; and *Easley* v. *Hunter*, 209 F. 2d 483, 487 (C. A. 10). Cf. *Brown* v. *Allen*, 344 U. S. 443, 459 (involving the related problem as to state court convictions).

In the instant case, the Court of Appeals found that the voluntariness of petitioner's tape-recorded

confession "was fully, fairly and extensively considered during the court-martial trial, and at each stage of the military court appeal system," (C. A. 5), including review by the civilian Court of Military Appeals. There is accordingly no occasion for further review by this Court.

2. Moreover, as shown hereafter, the facts do not raise issues which would afford a basis for collateral attack even on a judgment of conviction by a federal court.

a. Petitioner was advised, not once but half a dozen times, that he was suspected of murder and that he need not say anything incriminating.* As the statute requires (10 U. S. C. (Supp. IV) 831), the warning went further, for he was told that he need not say anything at all about the matter. Moreover, he was told that anything he might say could be used against him in case of trial.

No promises were made to petitioner and he was not the victim of coercion or duress. He was fed regularly, at the regular meal-time hours. When he expressed dissatisfaction with the lack of variety in his breakfasts, they were changed. A mattress and blankets were not furnished to him initially, but his cell was heated, it was lighted and constructed so as not to work unnecessary hardship on him (C. M. 238–239), and he was not deprived of anything that other prisoners had. Furthermore, he was given a mattress and blankets when he asked for them.

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*As we have shown, *supra*, p. 11, there was evidence that petitioner understood the words used.

Petitioner was not subjected to lengthy interrogation at unusual hours of the night. Compare *Watts* v. *Indiana*, 338 U. S. 49, 52–53; *Turner* v. *Pennsylvania*, 338 U. S. 62, 63–64; *Harris* v. *South Carolina*, 338 U. S. 68, 69–70; and *Haley* v. *Ohio*, 332 U. S. 596, 604. He was questioned for 2½ hours on February 23, and was in the company of the investigators for about three hours on the afternoon of the 24th. After a three-hour respite, he was interrogated for about 1½ hours that evening until 9:00 p. m. Petitioner was with the investigators the whole of the following day, February 25, from about 8:00 a. m. to 10:00 p. m.* However, the day was broken up with travel, tests, and rest periods as well as questioning periods. On February 26, he was with Sergeants Stanton and Boatner just long enough to make a successful recording of his statement.

In the petition (Pet. 2, 4, 8, 9), much is made of petitioner's relatively low mentality and his limited education. However, petitioner had passed seventh grade tests while in the service (R. 14–15); and his intelligence was not so limited that he could not understand the warnings given him and could not give a responsible voluntary statement. On all the facts, there was ample basis for the factfinders to conclude that petitioner's statements were voluntarily given. See *Lyons* v. *Oklahoma*, 322 U. S. 596.

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*Although petitioner said that he had a headache on February 25 and asked to see a doctor, there is nothing to indicate that he was seriously incapacitated. His request was not granted because no doctors were available, not because there was any intent to coerce him (C. M. 277–278).

Proper instructions were given by the law officer on this issue (C. M. 367–369, 385, 396).

b. Petitioner's argument (Pet. 13–15) that the rule of *McNabb* v. *United States*, 318 U. S. 332, applies to court-martial proceedings was expressly rejected in *Burns* v. *Wilson*, 346 U. S. 137, 145, n. 12:

> We reject petitioners' contentions that the rule of *McNabb* v. *United States*, 318 U. S. 332 (1943), renders the confessions inadmissable and requires the civil courts to hold that the courts-martial were void. The *McNabb* rule is a rule of evidence in the federal civil courts; its source is not "due process of law," but this Court's power of supervision of the administration of criminal justice in the federal courts. See 318 U. S., at 340; cf. *Gallegos* v. *Nebraska*, 342 U. S. 55 (1951). We have of course no such supervisory power over the admissibility of evidence in courts-martial.

The *McNabb* rule is a means used to insure compliance within the federal court system with Rule 5 (a), F. R. Crim. P., which requires a preliminary hearing "without unnecessary delay" for arrested persons. See *Mallory* v. *United States*, 354 U. S. 449. Not only is Rule 5 (a) inapplicable to court-martial proceedings, but also no process analogous to preliminary hearing has been provided by Congress in military law. Article 32 of the Uniform Code of Military Justice (10 U. S. C. (Supp. IV) 832) provides for an "investigation" somewhat akin to an in-

quest or open grand jury proceeding." The function of this "investigation" is quite different from the preliminary hearing required in the civil courts. In addition, the "investigating officer" is specially appointed in each case (Manual for Courts-Martial, United States, 1951, par. 33 (e), p. 40) and hence, unlike the situation in the civil courts, there is no continuing body before whom a military prisoner could be brought "without unnecessary delay" after arrest.

On the other hand, one of the principal purposes of the preliminary hearing procedure in the civil courts—to inform the prisoner of his privilege against self-incrimination—is accomplished through Article 31 (b) (10 U. S. C. (Supp. IV) 831), which requires that the prisoner be so informed by the arresting officers and others. In the instant case, as already pointed out, petitioner was repeatedly advised of his right to remain silent.

c. Petitioner also contends that the admission of the tape recording of his oral confession and trial counsel's comments regarding the recording amounted to requiring him to testify against himself, even though he elected not to take the stand (Pet. 16–17).

The Fifth Amendment does not bar the admission of a pretrial confession unless it is involuntary. *Wilson* v. *United States,* 162 U. S. 613, 623. Confessions which are otherwise admissible do not become

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[10] Article 32 provides in part: "This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline."

less so because they are oral, or written, or part oral and part written. *Thomas* v. *United States,* 15 F. 2d 958, 960 (C. A. 8). Similarly, once the authenticity of a tape recording of a relevant oral pretrial statement is shown, as it was here, the form in which the statement is reproduced in court does not render it excludable. Such evidence is not compulsory testimony by the petitioner. See *Burgman* v. *United States,* 188 F. 2d 637, 639–640 (C. A. D. C.); *Gillars* v. *United States,* 182 F. 2d 962, 973 (C. A. D. C.); *People* v. *Sica,* 112 Cal. App. 2d 574, 247 P. 2d 72, where statements during the course of a conspiracy were secretly recorded; *People* v. *Porter,* 105 Cal. App. 2d 324, 233 P. 2d 102, where the fabrication of a "story" by two defendants was secretly recorded; and *People* v. *Hayes,* 21 Cal. App. 2d 320, 71 P. 2d 321, where a sound motion picture of the giving of the confession was made.

The sole issue is what the defendant said while talking to the interrogator, not the manner in which the statement was preserved, whether (*e. g.*) through the memory of another who heard the statement, by recording, or by reduction to writing. *United States* v. *White,* 223 F. 2d 674 (C. A. 2), certiorari denied, 350 U. S. 888. Hence the tape recording was admissible in either auditory or transcript form, or both. *People* v. *Feld,* 305 N. Y. 322, 113 N. E. 2d 440.[11]

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[11] Petitioner now contends his oral statement was secretly recorded. There was evidence to dispute this at the court-martial trial (*supra,* pp. 10–11), but the recording would nevertheless be admissible even if obtained in secret. *On Lee* v. *United States,* 343 U. S. 747.

Military law prohibits comment upon the failure of an accused person to take the stand, but trial counsel is entitled to make fair comment on the evidence actually adduced. Manual for Courts-Martial, United States, 1951, par. 72 *b*, p. 111. He did nothing more than that here. The tape recording of the confession was properly in evidence, it was of the voice of petitioner, and counsel confined his remarks to the recording. He discussed its worth as evidence, just as he might with respect to a fingerprint. See *Hunt* v. *United States*, 231 F. 2d 784, 785 (C. A. 8). He did not extol the advantage of taking the stand as a witness, or suggest that petitioner personally should have rebutted the truthfulness of the confession. Cf *Wilson* v. *United States*, 149 U. S. 60, 66, and *Baker* v. *United States*, 115 F. 2d 533, 544 (C. A. 8), certiorari denied, 312 U. S. 692.

Moreover, petitioner's counsel failed to object to the prosecutor's statement when it was made and when any error could easily have been corrected. Therefore, he waived any objection he might have had. See *Johnson* v. *United States*, 318 U. S. 189, 199–201. In fact, the question was not raised at any stage of the military proceedings, even on appeal.[13]

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[13] It was first mentioned at the District Court hearing on the petition for habeas corpus (R. 71–73).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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